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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51-C-613

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY,

Plaintiffs,

JOHN MORRELL & COMPANY,

Intervener,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs, Chicago, Burlington & Quincy Railroad Company, et al, and John Morrell & Company, intervening plaintiff, submit herewith their state-

ment particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court entered herein on June 1, 1951. A petition for appeal is presented to the District Court herewith, to wit, on July 26th, 1951.

Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and order of the District Court entered in this case is conferred by Title 28, United States Code, Sections 1253, 1336, 2101 (b), 2284 and 2321-2325, inclusive, effective September 1, 1948, 62 Statutes, 928, 931, 962, 968, 969-970, and Title 5, United States Code, Section 1009, 60 Statutes 243.

Cases Sustaining Jurisdiction

Henderson v. *United States* 339 U. S. 816; *Eastern Central Motor Carriers Association* v. *United States,* 321 U. S. 194; *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 294 U. S. 499.

Statutes Involved

This appeal involves the interpretation of the following statutory provisions:

Section 6(7) of Part I of the Interstate Commerce Act, 41 Stat. 483 (49 U.S.C. Par. 6(7)) which reads as follows:

> "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or

receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 217(b) of Part II of the Interstate Commerce Act, 54 Stat. 925 (49 U.S.C. Par. 317(b)) which reads as follows:

"No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariffs than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1(7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part."

Section 218(a) of Part II of the Interstate Commerce Act, 54 Stat. 919, 925 (49 U.S.C. Par. 318(a)) which reads as follows:

"It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish

and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this part. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed

or prescribed: *Provided,* That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in this Act."

The National Transportation Policy, 54 Stat. 899, preceding Section 1 of the Interstate Commerce Act (49 U.S.C. Par. 1), which reads as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue proferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Sections 1(3), 1(4), 1(10) and 1(11) of Part I of the Interstate Commerce Act, 41 Stat. 474 (49 U.S.C. Pars. 1(3), 1(4), 1(10) and 1(11)), which read, in part, as follows:

1(3)(a) ". . . The term 'transportation' as used in this part shall include locomotives, cars, and other

vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported . . ."

1(4) "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request . . ."

1(10) "The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

1(11) "It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service . . ."

Section 5(1) of Part I of the Interstate Commerce Act, 54 Stat. 905 (49 U.S.C. Par. 5(1)) which reads, in part, as follows:

"Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Com-

mission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises . . ."

Section 1(18) of Part I of the Interstate Commerce Act, 41 Stat. 477 (49 U.S.C. Par. 1(18)) which reads, in part, as follows:

". . . Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Title 45, U.S.C., Pars. 71-74 (Twenty-eight Hour Law) 34 Stat. 607, 608; 36 Stat. 1167, which reads as follows:

"§71. *Transportation of animals; time of confinement; unloading for rest and feeding; unloading sheep*

No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars,

boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours. June 29, 1906, c. 3594, § 1, 34 Stat. 607.

"§72. *Animals unloaded to be fed and watered by or at expense of owner; lien*

Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or

masters, shall in such case have a lien upon such animals for food, care, custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this title, but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires. June 29, 1906, c. 3594, § 2, 34 Stat. 608.

"§73. *Penalty for failure to comply with law; when provisions for unloading not to apply*

Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of sections 71 and 72 of this title shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500; *Provided*, That when anomals are carried in cars, boats or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply. June 29, 1906, c. 3594, § 3, 34 Stat. 608.

"§74. *Penalty recoverable by civil action; duty of district attorneys to prosecute*

The penalty created by section 73 of this title shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means. June 29, 1906, c. 3594, § 4, 34 Stat. 608; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Other provisions of the Interstate Commerce Act and the Administrative Procedure Act are also incidentally involved.

Nature of the Case and the Ruling of the District Court

This action was brought by plaintiffs, who are common carriers by railroad, to set aside, annul, suspend and enjoin an order of the Interstate Commerce Commission entered March 12, 1951, in proceedings known as *John Morrell & Company Terminal Allowance, Ex Parte 104, Practices of Carriers Respecting Operating Revenues and Expenses, Part II, Terminal Services.* John Morrell & Company, the industry involved, by appropriate order of the District Court was authorized to intervene as a plaintiff in this action. It has not prosecuted a separate appeal in this cause but has joined with the other plaintiffs as authorized by Rule 48 of the Rules of the Supreme Court of the United States, as amended.

The Commission by Division 3 held in its forty-eighth supplemental report in Ex Parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part III, Terminal Services—John Morrell & Company Terminal Allowance* (May 8, 1936, 215 I.C.C. 431), that the existing line-haul rates of rail carrier plaintiffs must be construed to cover the delivery and receipt of shipments at the interchange tracks at the Morrell plant and that the payment to Morrell of an allowance for service performed beyond the interchange tracks provided a means by which the industry enjoyed a preferential service not accorded to shippers generally, and that rail carrier plaintiffs refunded or remitted a portion of the rates or charges collected or received as compensation for the transportation of property in violation of Section 6(7) of the Interstate Commerce Act. This report dealt only with the handling of dead freight. No findings were made or order entered with respect to deliv-

eries of livestock which rail carrier plaintiffs make with their own engines to the unloading pens within the Morrell plant area.

Upon petition filed May 25, 1936, the proceeding was reopened for further hearing, but the Commission did not assign the matter for hearing until June, 1943. At that time, the case was set for hearing before an Examiner of the Commission, and a new, independent record relating to the operations at the Morrell plant was begun. At this hearing plaintiffs introduced considerable evidence relating to the operations at the Morrell plant, and the Examiner issued a proposed report in which he recommended that the Commission find, with certain minor exceptions, that there was nothing unlawful with respect to the services performed at this plant. However, on June 15, 1945, Division 3 of the Commission issued a report (263 I.C.C. 69) in which it found that the payment of allowances and the delivery of livestock to the unloading pens was a violation of Section 6(7) of the Interstate Commerce Act. Upon further petition the proceeding was reopened, and, on June 11, 1946, a proposed report was served in which it was recommended that the payment of allowances be found unlawful as to dead freight, but that there was nothing unlawful in connection with the deliveries of livestock. Because of the showing that material changes were being made in the track layout and in operations within the plant, the case was again set for hearing before an Examiner, following which a report and order were issued by Division 3 of March 15, 1950, finding that the payment of allowances by respondents for the performance of switching service and the performance by respondents of switching services in connection with livestock beyond the described interchange tracks without reasonably compensatory charges in addition to the line-haul rates was unlawful in violation of Section 6(7)

of the Interstate Commerce Act. On March 12, 1951, the entire Commission entered an order affirming the findings of Division 3 in the prior reports and ordering plaintiffs to cease and desist from their present practices.

Believing that the Commission had misconstrued the law and its own statutory power, that it had refused to make findings on material issues involved, and that the Commission's order was not supported by proper findings and evidence, plaintiffs filed their complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On June 1, 1951, the Court entered an opinion, findings of fact, conclusions of law and a final decree dismissing the complaint. The Court held that the Commission had not exceeded its statutory powers and that the Commission's order was supported by the evidence. Copies of the Court's opinion, findings of fact, conclusions of law and final decree are appended hereto.

The Questions Involved Are Substantial

This case involves questions never before passed upon by the Courts in connection with the determination of rail carrier plaintiffs' obligations under their line-haul rates in the terminal services performed in connection with the receipt and delivery of carload freight at an industry. There are involved substantial questions not covered by the principles announced by the Commission in its original decision in the Ex Parte 104, Part II proceeding and which have not been passed upon by the Supreme Court.

One of these questions involves the issue of whether or not the circumstance that more than one carrier serves a plant either enlarges or diminishes the obligation of the respective carriers under their line-haul rates. Three of the rail carrier plaintiffs directly serve the Morrell plant.

Morrell switches dead freight between the interchange tracks and the conditioning, loading and unloading points within the plant with its own engine during the daytime. The Interstate Commerce Commission holds in this proceeding that since more than one carrier serves the plant there might be interference if these carriers performed the dead freight switching themselves. The order of March 12, 1951, is grounded on the premise that if plaintiffs performed the switching themselves, they might interfere with each other, and that such interference is a plant disability. That is to say, that if one carrier desired to switch the plant at the time when another carrier was spotting cars, that the two carriers would interfere with each other, and that, therefore, the industry was not entitled to receive service from either of the carriers. The effect of the Commission's decision, if sustained, will be to render unlawful the performance of switching service at an industry served by more than one carrier, even though such service might be performed without any interruption or any interference caused by any desires or disabilities of the industry. Thus, the Commission has departed from the original principles announced in Ex Parte 104 since the gist of the Commission's findings in that case was that a carrier's transportation obligation extends up to a point where it encounters interference from the *industry*. There is nothing in the original report to indicate that a carrier's transportation obligation ends at a point where it encounters interference from *another carrier*.

Plaintiffs contend there is nothing in the Interstate Commerce Act to indicate that Congress did not intend to give shippers a right to be served by more than one railroad nor to prohibit railroads from competing with each other for the traffic at a particular industry. The type of regulation which Congress chose did not eliminate the emphasis on

competition and individual freedom of action among the carriers. Thus, there is involved in this proceeding the substantial question of whether the fact that several carriers deem it in their interest to compete for the business of Morrell can affect their transportation duty under the line-haul rates. That question has never been passed upon by this Court.

In that same connection, there is also involved a question of whether the Commission, by finding that carrier interference diminishes the transportation obligation, can in effect nullify the so-called pooling provision of the Interstate Commerce Act (49 U. S. C. Par. 5(1)). If there is no duty to perform the switching service because of the fact that more than one carrier serves the plant, then such carriers, of course, are precluded from taking advantage of the pooling section of the Act, and the Commission by its reasoning has completely eliminated the pooling provision from the Act.

This question is of vital public importance because very many plants in the country are served by more than one carrier. In addition, the pooling provision of the Act was placed there by Congress to promote economy and efficiency of operation. And it is of great importance to have it decided whether the Commission has authority by its actions to nullify that provision.

There is also involved in this case the question of whether or not the line-haul rates on livestock include the terminal services involved in making delivery at destination, which, in turn, includes the question of whether or not that terminal service includes the placing of livestock cars at points where they can be unloaded. The Commission has found that rail carrier plaintiffs' obligation with respect to the delivery of livestock cars ends at the interchange tracks, and that at that point rail carrier plaintiffs have performed

all the service they are required to perform under their line-haul rates, and that placing the cars of livestock on the interchange tracks constitutes delivery. This is the *only* case in which either the Commission or the Courts have found that the delivery of livestock contemplated in the line-haul rates is completed with the placing of cars on interchange tracks short of the unloading points. There are no facilities at the interchange tracks for the unloading of livestock, but the Commission holds that the delivery to the unloading pens is a special and preferential service not accorded to shippers generally. In *Omaha Livestock Exchange* v. *Chicago & North Western Railway Company*, 178 I. C. C. 1; *St. Paul Livestock Exchange* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 194 I. C. C. 53; and *Chicago Livestock Exchange* v. *Atchison, Topeka and Santa Fe Railway Company*, 219 I. C. C. 531, the Commission compelled the railroads to remove special charges for such delivery. The effect of the Commission's order in this case would be to make the Morrell plant the *only* place in the United States where an extra charge would be assessed for the delivery of livestock.

The Commission's conclusions in this proceeding cannot be reconciled with the case of *United States* v. *Baltimore & Ohio Railroad Company*, 333 U. S. 169 (1948). In that proceeding the Commission concluded that the railroad's refusal to transport the livestock into the Swift Packing plant violated several provisions of the Interstate Commerce Act. That was found by the Commission to violate Section 3(1) because of the discrimination against a single commodity, livestock, and because the New York Central's deliveries of livestock to the sidetracks of Swift's nearby competitors subjected Swift to undue prejudice and gave those competitors undue preference. The Commission also found that the failure to deliver under the circumstances

shown was a violation of Section 1(6) which forbids unreasonable practices affecting the manner and method of delivering freight; as well as a violation of Section 1(9) which requires railroads to operate switch connections with private sidetracks without discrimination. The Supreme Court upheld the Commission's action as proper. The type of delivery, that is, to unloading facilities, contemplated in that case is analogous to the type of delivery presently performed by the rail carrier plaintiffs for Morrell which the Commission would hold unlawful.

A second question under this point is whether the terminol service of delivery of livestock at destination includes delivery to a point suitable for unloading. Both the Commission and Court below failed to mention or discuss the doctrine of *Covington Stock Yards* v. *Keith*, 139 U. S. 128. In that case the Court said (at pages 135-136):

> "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be

> delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."

The Commission itself, in another case, affirmatively approved the holding of the *Covington* case and stated that "It has long been the duty of the railroads as common carriers of livestock to provide suitable facilities for loading at origin and unloading at destination." *St. Louis-San Francisco Railway Company* v. *Central of Georgia Railway Company*, 264 I. C. C. 134, 162 (1945).

The law of the *Covington* case has been reasserted by the Supreme Court since the Ex Parte 104 proceedings were instituted. In *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 198, the Court said:

> "Transportation of ordinary livestock in carload lots from and to points other than public stockyards has always been deemed to include furnishing of facilities at the place of shipment for loading and at destination for unloading and suitable ways for convenient ingress and egress. Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 134, 135; Erie R. Co. v. Shuart, 250 U. S. 465, 468; 2 Hutchinson, Carr. 3d ed. Sec. 510." See also 13 C. J. S. 127-131.

The rule of the *Covington* case was specifically enacted into law to apply to public stockyards with an additional requirement that the carrier actually unload the livestock into suitable pens without additional charge, 49 U. S. C. Sec. 15(5). See *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4378*, House of Representatives, 66th Cong., 1st Sess., pp. 139, 141, 874, 875 and 881. This enactment specifically provides a saving clause as to delivery at other than public stockyards, thus preserving the rule of the *Covington* case, which does not require actual unloading, at points other than public stockyards. In the *Covington* case the Court held that delivery to a private point suitable for unloading could not be made the basis for

a charge in addition to the line-haul rate. The same ruling should apply at the Morrell plant, located in Ottumwa, Iowa, where the only point suitable for unloading is furnished by Morrell. There are no public stockyards in the city.

In *Erie R. Co.* v. *Shuart*, 250 U. S. 465, the Court held that the transportation service required of every common carrier by the Interstate Commerce Act, Secs. 1(3)(a), 1(4), includes the delivery of livestock to a point suitable for unloading. See also *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, decided since the Ex Parte 104 proceedings were begun, which holds that the Interstate Commerce Act and its amendments have not changed the *Covington* rule, and that the same rule has been repeatedly applied since the statute was adopted.

It is therefore clear that both at common law and under the Interstate Commerce Act it is the ordinary duty of the plaintiff carriers to render delivery of livestock to a point suitable for unloading. Yet the Commission holds that the plaintiff carriers' duty in this respect ends at the interchange tracks where there are no facilities for unloading. We believe that this problem presents a substantial issue of law and that the Commission's order in this respect, as affirmed by the Court below, is beyond the Commission's statutory authority and is "not in accordance with law" for purposes of the Administrative Procedure Act, 5 U.S.C. Sec. 1009(e).

Another question of substantial importance involved in this proceeding is whether or not the Commission has the right to decide where rail carrier plaintiffs' obligation under the Twenty-eight Hour Law ends, or, if they do not have such right, whether they may take action which would deny to rail carrier plaintiffs the right, by their own actions, to terminate their obligation under that law. Rail carrier

plaintiffs believe the law to be that their obligation under the Twenty-eight Hour Law continues as long as the cattle are in the course of transportation as defined in that law. The Courts have defined the extent of rail carrier plaintiffs' obligation to be one that continues until the cars have been placed at a point where the cattle can be unloaded. The Commission is not charged with the enforcement of the Twenty-eight Hour Law, and it would seem to follow therefrom that the Commission has no authority to determine where rail carriers' obligation under that law ends. The Commission presumed to find that rail carrier plaintiffs' obligation under the Twenty-eight Hour Law ends at the interchange tracks because the Commission found that their transportation obligation under the line-haul rate ended at the same point. This clearly was error for it to make such a determination. But the Commission goes on further and says that even if the carriers' obligation does not end at that point, the Commission's order does not prohibit the carriers from delivering the stock to the unloading pens, provided an additional charge is assessed. But the effect of the Commission's order is to prohibit the rail carriers from taking those necessary steps to relieve themselves of their obligation, because, if their transportation obligation under the line-haul rate ends at the interchange tracks, rail carrier plaintiffs have no right to proceed any further than that point with the livestock cars *without permission* of the industry. In fact, if the carriers' duty ends at the interchange tracks, then the industry can spot at its convenience when its engine comes on duty the next morning. Thus, the effect of the Commission's order is to require rail carrier plaintiffs to secure cooperation from the industry before they can terminate their liability under the Twenty-eight Hour Law. The industry is not amenable to the provisions of the Twenty-eight Hour Law, and, under the circum-

stances disclosed in this case, it was arbitrary for the Commission to enter an order which would remove from rail carrier plaintiffs the ability, by their own actions, to comply with the Twenty-eight Hour Law. Moreover, the Commission, by stating that the rail carriers may proceed to the unloading docks to satisfy the Twenty-eight Hour Law is manifestly begging the question which is: At whose convenience or for whose benefit are such deliveries made? If the duty to bring the confinement of animals to an end is upon the rail carriers, as required by the Twenty-eight Hour Law, such delivery cannot be deemed one merely for industry convenience; such delivery must be held part of the carrier duty as a matter of law. In addition, the duty to deliver livestock to a point where their confinement can be brought to an end cannot be shifted to the consignee under the Twenty-eight Hour Law. *Oregon-Washington Railroad & Navigation Co.* v. *United States*, 205 F. 337. The arbitrary action of the Commission becomes all the more apparent upon an examination of the evidence in this case which discloses that deliveries of livestock have been and are now being made by rail carrier plaintiffs with their own engines to the unloading pens without interference either from each other or from the industry.

Another question of substantial importance in this case is whether the line-haul rate contemplates the furnishing of a suitable car. It is the duty of a common carrier to furnish a car suitable for the transportation of the particular commodity tendered to it (49 U.S.C. 1(3)(a), 1(4), 1(10), 1(11)). That duty includes the obligation to furnish the switching service incident to rendering the car suitable for the transportation service. The duty to furnish a suitable car is the ordinary duty of all common carriers as to all traffic no matter whether the traffic originates on a team track or elsewhere, and, therefore, cannot be considered an additional or special service for which a charge in addition

to the ordinary line-haul rate can be assessed. On the contrary, the Commission has held in this proceeding that the switching is not contemplated in the line-haul rate. Such holding is in contradiction of its own holdings in other cases and is contrary to the law, both under the Interstate Commerce Act and at common law.

As related to this question, also, is the one regarding the necessity for the Commission to make a finding on the material issue of whether the present services were fixed in the line-haul rates. The line-haul rates here involved were originally fixed to include the present terminal services, especially with respect to livestock. The Commission has so held in several cases. This is a material issue in terminal service cases. Notwithstanding this, the Commission in this proceeding has failed to make a finding on this issue, as required by the Administrative Procedure Act. In failing to make a finding on this issue, the Commission's action was arbitrary and capricious and not in accordance with law.

Another question of substantial importance involved in this proceeding is whether or not the Commission's order contains adequate findings supported by substantial evidence. The Court below takes the position that the evidence introduced in this case is of the same type and character of evidence introduced in other terminal allowance cases. That is to say, the evidence in this case relates to the operations conducted in performing terminal services at this plant. The fact is, this proceeding involves issues not embraced by the principles announced in the original Ex Parte 104, Part II, report; and the issues here presented have never been passed upon by the Courts in other terminal allowance cases. In addition, it is significant to point out that in this proceeding the Commission emphasized the fact that, while the plant layout may be simple and efficient, the "question

in mind'' is potential interference among the several carriers, *if* they performed the switching. Potential interference has never been upheld by the Courts as a ground for diminishing carrier duties. In addition, the mere fact that the record contains evidence with respect to terminal operations does not mean that such evidence supports a conclusion such as the one reached by the Commission. We think it will not be denied that the evidence must support the Commission's conclusion and the Courts may examine the evidence to determine if the record considered as a whole will support the Commission's conclusion. The Commission has no arbitrary power to ignore or disregard the evidence which will not support its conclusions and pick out only such portions of the evidence as it may find to support its conclusion. In the instant proceeding the Commission did exactly that thing. The Commission picked out extreme, unusual or assumed situations and used these as the basis for its order, while at the same time ignoring the great bulk of the evidence which shows that there is no interference in the delivery of livestock and that the daytime switching could be performed by the rail carrier plaintiffs without any interference attributable to the industry.

It should be noted, also, that the Court below made no mention of, and apparently did not consider, the reports of the two Commission Examiners in this proceeding, which reports disagreed with the Commission's findings of fact. These two Examiners were the officers of the Commission who heard most of the evidence. We believe that the reports of the Examiners should have been given consideration by the Court below in determining whether the evidence supporting the order of the Commission was, as a whole, substantial. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. In connection with the evidence adduced at the hearings, we would like to point out that

certain Commission experts, presumably unbiased, were prevented from answering questions addressed to them seeking to determine what, if anything, was wrong with the plant layout from the standpoint of operating efficiency and adequacy. When it is considered that the Commission's order stands or falls on the propriety of its findings with regard to questions of operating convenience, adequacy of facilities and the like, a substantial question arises as to whether Commission experts, called by the Commission, may be prevented from giving relevant testimony on the very subjects in issue. Such action by the Commission, we believe, further emphasizes the arbitrary nature of the Commission's handling of this proceeding.

There is also presented the question of whether the Commission could properly base its order in whole or in part on findings made with respect to operations and conditions no longer in existence. By the order of March 12, 1951, the Commission adopted the findings made in its prior reports, including the one issued in May, 1936, which was based on evidence taken in the basic proceeding in 1932 and 1933. The record shows on its face that many changes were made in the plant since the Commission's report in 1936 and following the report made in 1945. It cannot be determined how much of the Commission's conclusions contained in the order of March 12, 1951, are based on conditions described in the 1936 and 1945 reports, which are no longer in existence and have no application to the present operations. Thus, the question is presented as to whether or not the findings contained in the March 12, 1951, report, which consisted merely in a sweeping affirmation of everything the Commission had done prior to that date, constituted proper findings so that this Court could determine with reasonable assurance why the Commission acted as it did. *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248.

There is also involved in this proceeding the interpretation of the National Transportation Policy contained in the Transportation Act of 1940. The question raised is with respect to that portion of the policy which requires the Commission to administer all provisions of the Act fairly and impartially. This question comes about because of the Commission's action in finding that for a rail carrier to go beyond a point of interference is a violation of Section 6(7) of the Act, while at the same time permitting a motor carrier serving the same plant to proceed beyond any point of interference, even though such motor carrier is subject to the provisions of Section 217 of the Interstate Commerce Act, which contains language almost identical to the language contained in Section 6(7) which rail carrier plaintiffs are said to be violating.

These questions, which we believe to have been decided erroneously or ignored by the Court below, have never been passed upon by the Supreme Court, and are of great importance not only to the railroad, livestock and meat packing industries, but to industry as a whole. Not only are particular pecuniary interests adversely affected, but long-standing, previously unchallenged industrial practices and economic balances are disrupted by the Commission's order. Accordingly, it is submitted that substantial questions are involved which call for appropriate exercise of appellate jurisdiction.

Respectfully submitted,

HARRY E. BOE,
R. B. ELSTER,
J. E. GOGGIN,
FRANK W. SULLIVAN,
WARREN H. WAGNER,
ELDON MARTIN,
Attorneys for Plaintiffs.

Dated: July —, 1951.

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 51 C 613

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; and WABASH RAILROAD COMPANY; *Plaintiffs;*

JOHN MORRELL & COMPANY, *Intervener,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

This cause came on for hearing on May 18, 1951, before a duly convened statutory three-judge court upon the application of the plaintiffs and intervener for an order to enjoin the order of the Interstate Commerce Commission dated March 12, 1951, with respect to allowances and charges for terminal switching services involved in the transportation of freight to and from the industrial plant of John Morrell & Company at Ottumwa, Iowa, and all of the parties being represented by counsel and evidence having been introduced, briefs received, and arguments made, and the court being fully advised in the premises, makes the following findings of fact and conclusions of law:

1. This action seeks to enjoin the order of the Interstate Commerce Commission, entered March 12, 1951, in *John Morrell & Company Terminal Allowance, Ex Parte No. 104. Practices of Carriers Affecting Operating Revenues and Expenses, Part II, Terminal Services,* issued by Divi-

sion 3 under the Forty-eighth Supplemental Report on May 8, 1936 (215 I.C.C. 431), the Report of the Commission on Further Hearing on June 14, 1945 (263 I.C.C. 69), the Report of the Commission on Further Hearing on March 15, 1950 (277 I.C.C. 173), and the final Report on Reconsideration, issued by the Commission on March 12, 1951. The order of March 12, 1951, requires the railroads, plaintiffs herein, to cease and desist from paying allowances to John Morrell & Company, for performance of switching or spotting service within its industrial plant at Ottumwa, Iowa, beyond the interchange tracks, found by the Commission to be the reasonable points for receipt and delivery of loaded and empty cars at said plant and the respective points where interstate line-haul transportation of said railroads begins and ends, and prohibits said railroads from performing spotting or switching service within the plant beyond said designated points of receipt and delivery, without a reasonably compensatory charge therefor, in addition to the line-haul rates and charges.

2. The Commission found in its Report of March 15, 1950, affirmed by its Report on Reconsideration, issued March 12, 1951, that existing line-haul rates of plaintiffs cover receipt and delivery of shipments at reasonably convenient points; that the interchange tracks designated in the reports constitute such reasonable points; that plaintiff's transportation obligation begins and ends at those interchange tracks; that the movement of loaded and empty cars by the railroads between said interchange tracks and points within the Morrell plant are plant services beyond the duty of the railroads, and that the payment of allowances for services performed by the industry on interstate shipments beyond the interchange tracks, and the movement by the railroads of livestock and livestock cars beyond said interchange tracks, without reasonably compensatory charges in addition to the line-haul rates, provide the means by which the industry enjoys a preferential service not accorded shippers generally, and thereby refunds or remits a portion of the rates or charges collected or received as compensation for transportation of property,

in violation of Section 6 (7) of the Interstate Commerce Act.

3. The Forty-eighth Supplemental proceeding arose under the Ex Parte No. 104 basic proceeding instituted by the Interstate Commerce Commission on July 6, 1931, in which the main report of May 14, 1935 (209 I.C.C. 11), was entered. The record in the Ex Parte No. 104 basic proceeding has not been submitted and is not on review in this action.

4. Many facts relating to existing traffic conditions at the Morrell plant are noted and considered in the several reports. These facts show the size of the plant, track layout, distances between points, and capacities, the location and number of buildings, loading and unloading points, and the car movement by each carrier necessary to reach each point, the volume and character of traffic moving in and out of the plant and the manner and movement required of each carrier in order to switch each commodity handled, the location and use of interchange tracks by carriers in delivering and receiving cars at the plant and the movements performed by plant-owned engines within the plant, the interferences and interruptions to movement of cars within the plant resulting from blocked and overloaded tracks, use of "hold tracks" while waiting the clearing of loading and unloading tracks, the coordination of spotting service in the plant to meet the requirements of industry operations resulting in delays and stand-by engine service. Commission agents, who observed the plant, presented evidence as to the industry operation and car movements, including a spot check of particular identified cars as each moved to and from the interchange tracks, through the plant, submitted in written reports. This evidence shows that in part, largely in delivery of livestock, the railroads perform the movement to and from the points of loading and unloading, allegedly as a part of the line-haul obligation to deliver, while freight, largely other than livestock, is received and delivered by Morrell engines at the interchange tracks of each carrier and moved to and from points within the plant, for which spotting service the carriers pay Morrell an allowance not exceeding $2.50 per car, although some move-

ments are made by industry engines without payment of allowances, particularly in the movement of livestock both in and out-bound.

This evidence is of the type and character previously held by the courts sufficient to disclose the existing traffic conditions at particular industrial plants and used in prior Ex Parte No. 104 supplemental proceedings as the basis of Commission determination of what is common carrier transportation and what is plant or industry service, and where, in point of time and space, transportation under the line-haul obligation begins and ends. The detail and volume of the cumulative record evidence, noted and considered in the several reports herein as the subordinate fact findings upon which the conclusion and ultimate report findings were made, are found in the reports of May 8, 1936, June 14, 1945, and March 15, 1950.

5. The Commission report on reconsideration, entered March 12, 1951, incorporates by reference the prior reports as a part thereof, and affirms the findings therein made. That report considered and discussed the contention of plaintiff railroads and Morrell, as made on oral argument, of the application of the Twenty-eight Hour Law, 45 U.S.C. 71-74, to the delivery of livestock at the Morrell plant, particularly as to whether or not that law legally required such delivery at the unloading pens in the plant, and prohibited delivery at the railroad interchange tracks as required by the Commission orders, under its determination that line-haul transportation of such livestock begins and ends at said interchange tracks. The question was previously considered and discussed in the report of June 14, 1945, pages 42a, 43a, where it was found that the Commission function in respect to said law is limited to determination as to whether it affects the issues of this proceeding, viz., the question as to where transportation under the line-haul obligation begins and ends at the Morrell plant. It was there recognized that carrier obligation under that law is imposed as long as the animals are in the course of transportation, and it was held that final delivery of the stock ends the carrier responsibility under the law, and that such delivery is completed at the Morrell plant by placing live-

stock cars on the carrier interchange tracks. In this consideration the Commission had before it the record evidence, above referred to under finding 4, as to the movement of cars in receipt and delivery of livestock at said plant. In the report of March 12, 1951, the Commission concluded that enforcement of the Twenty-eight Hour Law could not change the obligation of carriers to make deliveries at the point decided by the Commission, as the point in time and space where line-haul transportation ends, a decision which it is the sole authority of the Commission to make. It was further held that prior report findings do not prohibit delivery by the carriers at the unloading pens, since that is authorized, provided a reasonably compensatory charge, in addition to the line-haul rate, is made for the service beyond the interchange tracks.

6. The Commission findings, as shown by the several reports, are based upon and are supported by the record evidence as a whole.

7. Plaintiff railroads and intervening Morrell, the industry concerned, were afforded a full and fair hearing by the Commission in the proceeding here involved.

Conclusions of Law

1. The court has jurisdiction of the subject matter of this action.

2. The Interstate Commerce Commission is vested with statutory authority to enter the order of March 12, 1951, here involved.

3. The findings entered in the report of March 15, 1950, as affirmed in the report of March 12, 1951, are sufficient to support the order of March 12, 1951, here involved.

4. The record evidence, considered and noted in the several reports, as above referred to under finding 4, provides substantial support for the findings entered by the Interstate Commerce Commission in said report of March 15, 1950, as affirmed by the report of March 12, 1951.

5. The Commission has statutory authority, judicially approved, to determine the point where transportation, under the line-haul obligation, begins and ends at a particular industrial plant, on the basis of the circumstances and

facts showing existing traffic conditions at the plant being considered, as reflected by the entire record without reference to or consideration of prior custom and practice of carriers in performing terminal services and in paying allowances to certain shippers and without comparison of existing traffic conditions at the Morrell plant with those at any other plant.

6. The authority of the Commission to determine, upon the basis of record evidence of existing traffic conditions, the point in time and space, at which common carrier transportation under the line-haul obligation begins and ends at the plant under consideration, here the Morrell plant, cannot legally be made impotent, changed or destroyed, by attempted definition and determination of such point by the railroads and industry concerned, either by interpretation of established tariffs, or specific provisions therein. (U.S. v. D.&R.G.R.R. et al., 339 U.S. 186).

7. All evidence with respect to all operations at the Morrel plant before the Commission and considered by it is included in the record submitted in this cause.

8. The matter of the point at which carrier transportation service ends at the Morrell plant, is a question of fact to be determined by the Interstate Commerce Commission and its finding on that question will not be disturbed by the court when supported by evidence. (U. S. v. Wabash Railroad Co., 321 U.S. 403, 408).

9. The authority of the Commission to decide where transportation begins and ends at a particular plant applies alike to livestock, steel, iron, grain, processed meats, manufactured articles, valuation rates on nonferrous metals, and all other commodities, and is not limited to particular commodities or classes of commodities, except as to livestock delivery at public stockyards, required under the act, 49 U.S.C. 15 (5). The Commission action in cases cited by plaintiffs involved consideration of rates and services relating to livestock deliveries to particular points, and did not involve the decision as to where transportation begins and ends, as is considered in Ex Parte No. 104 supplemental proceedings. If the cited case of Omaha Live Stock Exchange v. C. &. N. R. Ry. Co., 178 I.C.C. 1, should

be interpreted as presenting the question of where the transportation begins and ends, that would necessarily constitute a decision based upon the existing traffic conditions at that point, facts not disclosed by the record herein, and could not, therefore, control the decision as to the Morrell plant where different traffic conditions exist, which are disclosed by this record.

10. Plaintiffs herein contend that the Twenty-eight Hour Law, 45 U.S.C. 71-74, requires delivery by carriers of livestock in railroad cars at the livestock pens in the Morrell plant rather than at the carrier interchange tracks, the point determined by the Commission as the place of delivery of such freight. That law prohibits railroads from confining certain live animals in cars for more than 28 consecutive hours, without unloading, for rest, water and feed, making it the duty of the person in custody of such animals to feed and water them, at the cost of the owner. It provides a penalty against the carrier for willful violation. The Commission, in its report of June 14, 1945, disavowed authority to interpret or enforce that law, holding that its only function is to determine whether the statute affects issues involved in this proceeding, and, in that respect, that carrier responsibility under the act continues as long as the animals are in the course of transportation, and that final delivery ends that carrier responsibility. By the terms of the act itself carrier duty to unload within each consecutive 28 hours ends with the completion of the transportation which is the obligation of the carriers to perform. The act does not require delivery at any particular point, and here the Commission has determined that the transportation required of the carriers, under their line-haul obligation, ends at their respective interchange tracks. Therefore this transportation at the Morrell plant ends at such interchange tracks, and delivery at those points removes the animals from the custody of carriers and places that custody in Morrell. Any detention of animals in cars beyond the 28-hour limit after that delivery is the responsibility of Morrell, not the carriers, and Morrell will be at liberty to remove the cars to its unloading pens at any time after such delivery, or, if it so desires may arrange

with carriers to make that switch plant movement for them, by paying a reasonably compensatory charge therefor, in addition to the line-haul rate. The Twenty-eight Hour Law in nowise supersedes Commission authority in deciding where transportation by common carrier railroad begins and ends.

11. Plaintiffs contend that failure of the Commission to prohibit pickup and delivery of freight within the Morrell plant by motor carriers is a discrimination against rail carriers, who are required to deliver and receive freight at that plant on their interchange tracks. The Commission in its report of March 12, 1951, held this issue to be beyond the scope of this proceeding. The transportation service performed by motor carriers differs in many respects from that performed by railroads, including terminal services, much of which may relate to inherent advantages of the different types of service. This is recognized in the provisions of the Interstate Commerce Act where railroads are regulated under Part I and motor carriers under Part II. The National Transportation Policy, 49 U. S. Code, Notes preceding Secs. 1, 301, 901, and 1001, states the policy of Congress, not the authority of the Commission, to provide "fair and impartial regulations of all modes of transportation", and requires the Commission so to administer the act as "to recognize and preserve the inherent advantages of each" type of transportation. There is no legal error in the holding of the Commission that the alleged discrimination between motor carrier and rail carrier delivery, at the Morrell plant, is not within the scope of this proceeding.

12. The complaint herein should be dismissed at the cost of plaintiffs.

(Signed) WALTER C. LINDLEY,
Judge, U. S. Court of Appeals for the Seventh Circuit;
(Signed) JOHN P. BARNES,
Judge, U. S. District Court;
(Signed) M. L. IGOE,
Judge, U. S. District Court.

June 1, 1951.

APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 613

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; and WABASH RAILROAD COMPANY, *Plaintiffs*,

JOHN MORRELL & COMPANY, *Intervener*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Lindley, Circuit Judge; Barnes, Chief District Judge and Igoe, District Judge

LINDLEY, *Circuit Judge:*

This is a suit by the railroads serving John Morrell & Company, the intervener, to set aside the Interstate Commerce Commission's report and order of March 12, 1951, entered in the proceeding known as John Morrell & Company, Terminal Allowance, Ex Parte 104, Practices of Carriers Respecting Operating Revenues and Expenses, Part II, Terminal Services. The report reaffirmed the Commission's prior findings to the effect that the plaintiffs' common carrier obligations under their interstate line-haul rates do not extend beyond certain interchange tracks described in the prior reports of Division 3 of the Commission and that carrier payment of an allowance to the industry for performing switching service beyond those interchange tracks or carrier spotting of livestock cars beyond such tracks without compensatory charges in addition to the established line-haul rate was unlawful, and ordered plaintiffs to cease and desist from engaging in such practices.

The Commission instituted the original Ex Parte No. 104 proceeding, an investigation of Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, on July 6, 1931. In its report of May 14, 1935, 209 I.C.C. 11, the Commission found that when a carrier is prevented from performing an uninterrupted service to loading or unloading points within a plant area by reason of some action or disability of the industry or its plant, the carrier's duty with respect to delivery or receipt of cars ends at the point of interruption or interference, and that any allowance to the industry for performing service beyond such point or performance thereof by the carrier without a charge over and above its line-haul rate was unlawful, in violation of Section 6 of the Interstate Commerce Act, 49 U.S.C.A., Sec. 6. A similar finding of illegality was made with respect to the payment of an allowance for or carrier performance of plant spotting service in excess of the service required in making a simple placement or in team-track spotting. The instant case brings up for review the forty-eighth supplementary proceeding applying the general principles laid down by the Commission in the original Ex Parte No. 104 report. This proceeding, with respect to which Division 3 made its first report on May 8, 1936 (215 I.C.C. 431), has extended over a 16 year period during which four different hearings have been accorded the railroads and the intervener. The Division's intermediate decisions are reported at 263 I.C.C. 69 and 277 I.C.C. 173; the Commission's final report and order, entered March 12, 1951, is as yet unreported. The plaintiffs and the intervener contend that the Commission's order directing the carriers to cease paying allowances to Morrell on the cars handled by the industry's engine beyond the interchange tracks and making deliveries beyond said tracks without the assessment of a proper charge is arbitrary and capricious, without substantial support in the evidence and, therefore, beyond the Commission's power.

The intervener, John Morrell & Company, operates a meat packing plant in Ottumwa, Iowa, located in the Ot-

tumwa Switching District. Since the plant was established in 1877, it has been served directly by the lines of the Burlington, Milwaukee and Rock Island and indirectly by the Wabash.[1] Each of the three carriers directly serving the plant has sidings and spur tracks within the plant area, the Burlington entering from the northwest, the Milwaukee from the southwest and the Rock Island from the northeast, and the industry has additional trackage of its own. Traffic at the Morrell plant consists principally of outbound carloads of fresh meats and packing house products and inbound carloads of livestock. Approximately 90% of the livestock is delivered at unloading pens within the plant by the carriers with their own engines at night when the plant is not in operation. Daytime traffic into and out of the plant, moving between the carriers' interchange tracks and the loading and unloading points within the plant area, is handled by the industry's engine, the carriers paying the industry an allowance, based on actual cost, up to a maximum of $2.50 per car. The order sought to be enjoined, which is based on the conclusion "that the line-haul carriers could not deliver and remove empty and loaded cars at the various loading and unloading points in the plant in uninterrupted movements at their operating convenience and that under the conditions set forth, services beyond the interchange tracks were in excess of the services respondents were required to perform at their line-haul rates", would require plaintiffs (1) to cease making livestock deliveries at the unloading pens unless an extra charge is assessed for performance of the spotting service beyond the interchange tracks and (2) to discontinue paying allowances to the industry on cars handled by the industry's engine.

Inasmuch as it is well settled that the Commission is authorized to determine the points at which transportation begins and ends and to prohibit the performance of services

[1]Carload traffic moving to and from the Morrell plant via the line of the Wabash is handled by the Milwaukee over its tracks between the plant and the connection of the Milwaukee and the Wabash about two miles west of the plant.

not embraced therein,[2] it follows that the principal question for determination by this court is whether the evidence before the Commission was sufficient to warrant its conclusion that the circumstances existing at the Morrell plant constituted plant interference or interruption within the meaning of the principles announced in Ex Parte No. 104, supra, and approved by the Supreme Court in United States v. American Sheet & Tin Plate Co., 301 U. S. 402.[3] The carriers contend that there is no evidence to support a finding of an interruption in or interference with terminal service caused by the desires or disabilities of the industry, as contemplated in the Commission's decision in Ex Parte No. 104. They assert that the Commission's finding that they could not perform the necessary spotting service at the Morrell plant at their convenience without interfering with each other is based on an hypothetical situation rather than on the actual facts of the case and that it is contrary to the "only testimony of record by railroad operating men". The testimony referred to was to the effect that, with the industry's engine handling the daytime switching operations and the carriers' engines spotting livestock shipments

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[2] See *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, in which the Supreme Court, approving the general principles announced by the Commission in its original report in Ex Parte No. 104, stated at page 408, "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it."

[3] CF. Interstate Commerce Commission v. Hoboken Manufacturer's Railroad Co., 320 U. S. 368, where the court observed, at page 378: "The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. Los Angeles Switching Case, 234 U. S. 294, 311-14; United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 408; United States v. Pan American Petroleum Corp., 304 U. S. 156, 158; Baltimore & Ohio R. Co. v. United States, 305 U. S. 507, 525-6; Swift & Co. v. United States, 316 U. S. 216, 222-5 and cases cited."

only during the hours when the plant and the industry's engines were not in operation, there had been no interference in the past. However, the maps which were introduced in evidence, showing the complete track layout and the location of the various loading and unloading points within the Morrell plant, considered in conjunction with the reports of the Commission's inspectors who had made on-the-spot studies of the terminal service practices and facilities at the plant, would certainly seem to provide ample evidentiary support for the Commission's findings that the plant's facilities are insufficient for the carriers to make deliveries at their convenience without interference from one another and from the industry's engine.

Even so, say the carriers and the intervener, inasmuch as the plant facilities have not been found to be inadequate for terminal use by one carrier alone, the potential interference which might materialize, if each of the carriers spotted for unloading all of the cars hauled by it, should not be said to constitute a plant disability within the meaning of the Commission's report in the original Ex Parte No. 104 proceeding, since so to hold would be to make the extent of a carrier's obligations under its line-haul rates dependent on the number of carriers serving the Morrell plant rather than on the nature of the plant's physical facilities. And they point to the statutory provision authorizing carrier pooling of traffic and service (Section 5(1) of the Interstate Commerce Act) as indicative of the impropriety of such a result. Their argument overlooks, we think, the fact that the Commission's findings with respect to plant disability and interference rest not alone on the fact that the Morrell plant is served by more than one carrier but are based also on the diversity of ownership of the tracks within the plant area, which makes it impossible for any one carrier to serve all the plant loading and unloading points without using or crossing tracks of the other carriers, and on the even more significant fact that the industry's switching engine, which is in operation from 6:30 a.m. to 7:00 p.m. six days each week, interferes with daytime carrier movements within the plant area. In the light of these facts and circumstances, the Commission's findings as to interference and disability

cannot be set aside as arbitrary or otherwise impugned by reason of the fact that, in practice, a combination of nighttime carrier switching and daytime switching by the industry's own engine, for which switching service the industry has been paid allowances by the carriers, has prevented the realization of the potential interference inherent in the existing situation.[4]

The intervener contends that, because the Commission failed to make an express finding as to whether spotting service is or is not included in the line-haul rates involved in this proceeding, its order cannot stand. But it must be remembered that this proceeding is supplementary to the original Ex Parte No. 104 proceeding, in which, as the Supreme Court observed in the Tin Plate case, supra, at page 404, "The Commission found that the line-haul rates had not been fixed to compensate the carriers for the performance of the service in question"; that finding must be given effect in a proceeding such as this, which grows out of the original proceeding and involves nothing more than the application of the general principles announced therein to the facts of the particular case.

As to the intervener's contentions with respect to a carrier's duty to furnish cars and to make delivery thereof at points suitable to the shipper, contentions which, concerned as they are with the duties and obligations of a carrier under a line-haul rate, are directed against the Commission's determinations in the original Ex Parte No. 104 proceeding, which are not before this court, rather than to the propriety of the application made, in the case at bar, of the principles announced in that proceeding and subsequently approved by the Supreme Court, it was determined

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[4] The fact that carrier spotting of livestock cars is done only at night, when neither the plant nor the industry's engine is in operation, certainly does not tend to show that the carriers are able to make deliveries to the unloading pens in uninterrupted movements at their operating convenience but rather would seem to indicate, if anything, a recognition on their part of the fact that interference would be encountered if deliveries were attempted during the hours when the plant and the industry's engine are in operation.

in the original proceeding that, where an interference or plant disability prevents an uninterrupted carrier movement to or from loading or unloading points inside a plant area, then interchange tracks on the fringe of the plant area constitute a suitable point for carrier receipt and delivery of cars. And the carriers' arguments that the Commission's order will result in a discriminatory preference of other shippers over Morrell and in undue prejudice to the carriers themselves in competing with their motor carrier rivals for Morrell's business, arguments which have a strong practical appeal and seem to us to cast some doubt on the wisdom of the Commission's decision, seem, nonetheless, to be equally beside the point, for the fact that certain shippers may be receiving unlawful allowances or services does not entitle Morrell or any other shipper to the same or similar unlawful advantages. Nor does the fact that plaintiffs' motor carrier competitors may continue to make deliveries inside the Morrell plant mean that the plaintiffs should be allowed to do so in violation of Section 6(7) of the Interstate Commerce Act.[5]

To the contention that the Commission's order is in direct conflict with the carriers' duties under the Twenty-eight Hour Law, 45 U.S.C.A., Secs. 71-76, which, generally speaking, prohibits the confinement of livestock in transit for a period in excess of 28 hours without unloading for water, feed and rest, there appear to be two answers. The first is that the carriers' liability under the statute is terminated on delivery of the livestock, and the Commission, whose function it is to determine when and at what points transportation begins and ends, United States v. Wabash R. Co., et al., 321 U. S. 403, 408, and as an incident thereto, at what point delivery is complete, has determined that, in the case of shipments to the Morrell plant, delivery is made by moving the cars onto the interchange tracks, at which time

[5] It should be remembered that the order here under attack does not prohibit deliveries beyond the interchange tracks but merely requires the assessment of a proper charge for this service, which the Commission has determined is not included in the carriers' obligations under their established line-haul rates unless it can be performed at the carrier's operating convenience and without interruption or interference.

and place the carriers' duties under the Twenty-eight Hour law would seem to be discharged. But, even if we assume that, under the statute, the carriers' liability under the latter Act is not terminated until the livestock cars have been spotted at the point where the consignee desires to unload them, the statute does not indicate that, if the spotting service requires a service in excess of that to which the consignee is entitled under the line-haul rate, no additional charge may be assessed for such additional service. This, then, is the second answer; the Commission's order does not prohibit delivery to the unloading pens inside the plant but requires only that a proper charge be made for such service when performed.

Plaintiffs complain that the fact that the Commission may, in the case of one packing plant, determine that the carriers' obligations under their line-haul rates are fulfilled by placing the livestock cars on an interchange track on the fringe of the plant area while deciding, in the case of another packer, that the carriers' line-haul rate obligations require that the livestock be spotted at unloading pens inside the plant not only results in a discriminatory preference of one shipper over another but leaves the carriers in the dark as to what services they are obliged to extend to shippers whose particular cases have not been considered and decided by the Commission. While it is true that the application of the general principles of Ex Parte No. 104 to the facts and circumstances of particular cases may result in *apparent* discriminations as between shippers, those apparent discriminations will vanish when it is seen that, in each case, the shipper is accorded delivery to such point as it designates if that point can be reached by the carrier in an uninterrupted movement at its operating convenience and, if not, to the point of interruption or interference. Nor are the carriers left without a guide in the case of shippers who have not been investigated by the Commission, for the Commission has indicated (209 I.C.C. 11) that their line-haul obligations do not extend beyond the performance of a spotting service equivalent to that involved in making a simple placement or in teamtrack spotting, thus providing the carriers with a yardstick by

which they may measure their obligations to any particular shipper.

We conclude that the Commission's order is supported by substantial evidence. The complaint is dismissed.

The foregoing is made a part of our more formal findings of fact and conclusions of law of even date herewith.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 613

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AND WABASH RAILROAD COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

DECREE

The above action came on for hearing before the duly constituted three-judge statutory court, sitting in the United States Court for the Northern District of Illinois, at Chicago, on May 18, 1951, and having been submitted by counsel for plaintiffs, intervening plaintiff, and defendants, upon the pleadings, the certified portions of the Interstate Commerce Commission record, as offered by plaintiffs, and upon briefs and arguments of counsel, and the Court having duly considered the issues so presented and the law and facts relating thereto, and being fully advised in the premises and having entered its Findings of Facts and Conclusions of Law, to the effect that the complaint herein should be dismissed,

It is therefore ordered, adjudged, and decreed that the complaint herein be, and the same is, hereby dismissed, at the cost of plaintiffs.

This the 1st day of June, 1951.

(Signed) WALTER C. LINDLEY,
Judge, United States Court of Appeals for the 7th Circuit.

(Signed) JOHN P. BARNES,
Judge, United States District Court.

(Signed) M. L. IGOE,
Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51-0-613

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, PLAINTIFFS-APPELLANTS

AND

JOHN MORRELL & COMPANY, INTERVENER-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States and Interstate Commerce Commission, pursuant to Rule 12, para-

graph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, entered on June 1, 1951, by a district court of three judges specially constituted pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing appellants' complaint, which sought to set aside an order made by the Interstate Commerce Commission. Appeal was allowed on June 26, 1951, and appeal papers served on the Attorney General of the United States and on the Interstate Commerce Commission on July 30.

The Commission order involved in this appeal finds that the interchange tracks located at the packing plant of intervener-appellant, John Morrell & Company (hereinafter called "Morrell"), constitute the reasonable point for the receipt and delivery of loaded and empty freight cars, and the point at which line-haul railroad transportation to and from that plant begins and ends; requires that the plaintiffs-appellants, four railroads serving the plant, cease and desist from paying allowances to Morrell for Morrell's performance of switching and spotting service within its industrial plant, beyond the interchange tracks; and prohibits the railroads from performing that service for Morrell without making reasonably compensatory charges in addition to the regular line-haul rates. The pertinent reports of Division Three of the

Commission appear in 215 I.C.C. 431 (1936), 263 I.C.C. 69 (1945), and 277 I.C.C. 173 (1950). The final report of the entire Commission is reported in 280 I.C.C. 419 (1951).

The order was entered in the forty-eighth supplemental proceeding which has taken place pursuant to the Commission's Ex Parte No. 104 proceeding, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* Almost one hundred similar orders have been entered, and of all of these that have been reviewed in the courts—some thirty-five orders—have been sustained. The general legal principles involved have been repeatedly examined by the courts and were recently summarized by this Court in *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, as follows:

> The Commission undertook its general investigation, *Ex parte 104,* in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without "interruption" occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in *Ex parte 104,* such a convenient delivery point marks the beginning

and end of what is termed "line-haul" transportation, and is the extent of the service which may be performed under the line-haul rate. The Commission's authority to determine the point where transportation duty ends and industry convenience begins was upheld by this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402. We have repeatedly sustained the Commission in its application of *Ex parte 104* principles to particular plants where it has prohibited the performance of services beyond the point fixed under a line-haul rate. In issuing cease and desist orders in these cases the Commission has acted pursuant to its duty to enforce § 6(7) of the Interstate Commerce Act, which section prohibits departure from filed tariffs and the rendering of preferential services.[1]

Here, the Commission concluded after extended investigation and hearings that the railroads could not perform switching service at the Morrell plant, beyond the interchange tracks, at their ordinary operating convenience. This was rested in part upon findings that the carriers "would have to use the same tracks to a considerable extent to reach the various loading and unloading points within the plant area, which could not be done without interfering with one another, and in addition,

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[1] See, also, *Corn Products Refining Co.* v. *United States*, 331 U.S. 790; *Hanna Furnace Corp.* v. *United States*, 323 U.S. 667; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156; *A. O. Smith Corp.* v. *United States*, 301 U.S. 669; *Goodman Lumber Co.* v. *United States*, 301 U.S. 669.

would have to contend with industry power" which is used by Morrell for various intra-plant rail operations which it conducts (280 I.C.C. at 420).[2] Dealing with Morrell's contention that the interference was caused by the presence of several carriers, rather than by the industry, and that the principles enunciated in *Ex Parte No. 104* apply exclusively to interference caused by the industry, the Commission specifically found that the root cause of the difficulty encountered in making uninterrupted deliveries on the industry's tracks was a "plant disability," the fact that Morrell had "insufficient facilities" (280 I.C.C. at 421).

The district court has written a careful opinion and has entered detailed findings of fact. Speaking for the court, Judge Lindley stated that "the maps which were introduced in evidence, showing the complete track layout and the location of the various loading and unloading points within the Morrell plant, considered in conjunction with the reports of the Commission's inspectors who had made on-the-spot studies of the terminal service practices and facilities at the plant, would certainly seem to provide ample evidentiary support for the Commission's findings that the plant's facilities are insufficient for the carriers to make deliveries at their convenience without interference from one another and from the industry's

[2] Other characteristics of Morrell's facilities on which the Commission made detailed findings are summarized in the district court's Finding No. 4, discussed *infra*.

engine" (Op., p. 5). While no effort will be made here to set forth the detailed and voluminous evidence upon which the Commission's findings in this case are based—evidence which is noted and considered in the various reports—we invite the Court's attention to the comprehensive nature of that evidence. On this subject, the district court stated in its Finding No. 4:

> Many facts relating to existing traffic conditions at the Morrell plant are noted and considered in the several reports. These facts show the size of the plant, track layout, distances between points, and capacities, the location and number of buildings, loading and unloading points, and the car movement by each carrier necessary to reach each point, the volume and character of traffic moving in and out of the plant and the manner and movement required of each carrier in order to switch each commodity handled, the location and use of interchange tracks by carriers in delivering and receiving cars at the plant and the movements performed by plant-owned engines within the plant, the interferences and interruptions to movement of cars within the plant resulting from blocked and overloaded tracks, use of "hold tracks" while waiting the clearing of loading and unloading tracks, the coordination of spotting service in the plant to meet the requirements of industry operations resulting in delays and stand-by engine service. Commission agents, who observed the plant, presented evidence as to the industry operation

> and car movements, including a spot check of particular identified cars as each moved to and from the interchange tracks, through the plant, submitted in written reports.

The court went on to state that "this evidence is of the type and character previously held by the courts sufficient to disclose the existing traffic conditions at particular industrial plants and used in prior *Ex Parte No. 104* supplemental proceedings as the basis of Commission determination of what is common carrier transportation and what is plant or industry service, and where, in point of time and space, transportation under the line-haul obligation begins and ends" (ibid.). There can be no serious question as to the correctness of this conclusion.

Morrell has emphasized, throughout the proceedings, that the carriers and Morrell have operated, in the past, according to a plan whereby the industry's engine moves traffic in and out of the plant during the daytime (the carriers paying the industry an allowance on such traffic), while the carriers operate with their own engines at night, when the plant is closed to ordinary operations. This shows, appellants contend, that the interference with carrier delivery is merely potential and not actual. As the district court quite properly observed, however:

> The fact that carrier spotting of livestock cars is done only at night, when neither the plant

> nor the industry's engine is in operation, certainly does not tend to show that the carriers are able to make deliveries to the unloading pens, in uninterrupted movements at their operating convenience but rather would seem to indicate, if anything, a recognition on their part of the fact that interference would be encountered if deliveries were attempted during the hours when the plant and the industry's engine are in operation. (Op., p. 6)

Appellants further contend that this case is different from the ordinary *Ex Parte No. 104* case to the extent that the traffic involved consists of livestock.[3] Relying on *Covington Stock Yards* v. *Keith*, 139 U.S. 128, and similar cases, they state (Statement as to Jurisdiction, p. 12):

> In the *Covington* case the court held that the delivery [of livestock] to a private point suitable for unloading could not be made the basis for a charge in addition to the line-haul rate. The same ruling should apply at the Morrell plant, located in Ottumwa, Iowa, where the only point suitable for unloading is furnished by Morrell. There are no public stockyards in the city.

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[3] The only section of the Interstate Commerce Act which makes a distinction between commodities in defining the limits of transportation is Section 15 (5), 49 U.S.C. Sec. 15 (5). That Section requires railroads carrying livestock to *public stockyards* to deliver the animals to suitable pens. By its express terms, it has no application whatever to deliveries of livestock to private packing companies. Neither the Commission nor the courts have held in any case that any commodity destined for an industrial shipper is lawfully entitled to delivery switching in excess of team track delivery.

There is no conflict between the cases cited by appellant and the present decision. Concededly, an industrial shipper of livestock, or of any other commodity, is normally entitled to have its traffic switched to a private siding which it designates for unloading. And it is clear that no added charge may be made for a simple placement of the cars at the designated point. The *Ex Parte No. 104* cases fully recognize this but hold that there is a limit to the terminal service to which the shipper is entitled: the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the shipper. Morrell's contention, which appears to be that it is, in all circumstances, entitled to free delivery to the pens within its plant, carried to its logical extreme, would mean that the carriers would have to perform free terminal service even if performance entailed countless switching operations and an untold number of industry-caused delays. None of the cases cited by appellant furnishes the slightest support for such a proposition. Indeed, none of them involved any question of industry interference with delivery.[4] Appellants mistakenly assert that the district court failed to consider the cases which they cite. The court stated in its Conclusion of Law No. 9:

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[4] In the *Covington* case, the opinion makes clear that the place at which the shipper sought delivery was an adequate facility, "put in proper condition to be used for that purpose." 139 U.S. at 136.

> The Commission action in cases cited by plaintiff involved consideration of rates and services relating to livestock deliveries to particular points, and did not involve the decision as to where transportation begins and ends, as is considered in Ex Parte No. 104 supplemental proceedings.

The district court also declared, quite correctly, that "the authority of the Commission to decide where transportation begins and ends at a particular plant * * * is not limited to particular commodities or classes of commodities * * *" (*ibid.*).

Appellants also state that in a number of cases involving other packing plants the Commission has compelled carriers to make delivery to unloading pens without added charge. This is true, but it involves no inconsistency. Morrell can obtain free delivery to its pens by the simple expedient of providing adequate facilities for the placement operation. As Judge Lindley stated, "While it is true that the application of the general principles of Ex Parte No. 104 to the facts and circumstances of particular cases may result in *apparent* discriminations as between shippers, those apparent discriminations will vanish when it is seen that, in each case, the shipper is accorded delivery to such point as it designates if that point can be reached by the carrier in an uninterrupted movement at its operating convenience and, if not, to the point of interruption or interference" (Op., p. 9).

Appellants assert further that the Commission failed to find that the terminal services sought are not included in the line-haul rates. As the district court noted in dismissing this contention (Op., p. 7), the instant proceeding is supplementary to the original *Ex Parte No. 104* proceeding. In the main report in *Ex Parte No. 104,* 209 U.S. 11, 44, the Commission found that line-haul rates had not been fixed to compensate carriers for spotting service in excess of simple switching or team track delivery. The purpose of the supplemental proceedings is to determine whether in particular cases services in excess of simple switching are being performed. That was found to be the case here. If such finding has a rational basis—and we believe it clear that it has—then, the cease and desist order is valid.

Appellants also argue that a substantial issue is presented with respect to the possible application of the so-called Twenty-Eight Hour Law (45 U.S.C. §§ 71-74). That law, dealing with the care of animals in transit, prohibits railroads from confining cattle in cars for more than twenty-eight consecutive hours, without unloading for rest, water and feed, making it the duty of the person in custody of the animals to feed and water them, at the cost of the owner. It is plain from the statute—and appellants do not contest the point—that the carrier's duty under the Twenty-Eight Hour Law is terminated when it makes delivery of the cars.

United States v. *Philadelphia R. Co.*, 233 Fed. 202 (E.D. Pa.).[5] Appellant's argument appears to be that, since the Commission is not charged with enforcement of the Twenty-Eight Hour Law, it could not properly determine, in this case, when transportation comes to an end, i.e., the point in the Morrell plant where delivery to Morrell was completed. That argument is untenable. It is within the exclusive jurisdiction of the Commission to determine, for purposes of the Interstate Commerce Act, the point at which transportation begins and ends. *United States* v. *Wabash R. Co.*, 321 403, 408; *United States* v. *United States Smelting Co., supra.* That the question of what constitutes a delivery may also be material in a case involving application of the Twenty-Eight Hour Law—a law which the Commission does not administer—nowise detracts from the Commission's duty and authority to determine what services are covered by existing line-haul rates.

The Commission's decision leaves Morrell free to do one of three things: (1) it can make its pens reasonably accessible and obtain delivery to that point free of charge; (2) it can retain the existing set-up and move the cars from the interchange tracks to its pens with its own engine; or (3) it can employ the carrier's engines for that purpose, paying a reasonably compensatory fee for the service.

[5] If the consignee fails to unload them promptly thereafter, that, of course, is solely the consignee's responsibility. See *ibid.*

It cannot, however, receive a highly specialized delivery service of a kind that is necessitated by the deficiencies of its own plant, without paying for that service. The Interstate Commerce Act, § 6(7), prohibits preferential delivery service. Nothing in the Twenty-Eight Hour Law requires it.

Appellants also claim that the decision places rail carriers at a disadvantage in competing with motor carriers which provide free pick-up and delivery service, and that it accordingly violates the National Transportation Policy (49 U.S.C., Notes preceding §§ 1, 301, 901 and 1001) which directs the Commission to administer all provisions of the Interstate Commerce Act fairly and impartially. Appellants fail to note that the National Transportation Policy also requires the Commission so to administer the Act as "to recognize and preserve the inherent advantages of each" type of transportation. Rail carriers have repeatedly contended in previous *Ex Parte No. 104* cases that the pick-up and delivery service which motor carriers characteristically provide gives them an unfair competitive advantage. In no case has the contention prevailed.

The only real issue raised by this litigation is whether the record as a whole supported the Commission's finding that the kind of delivery Morrell had been receiving was in excess of simple switching or team track delivery. The district court,

after a careful examination of the entire record, concluded that the Commission's determination was fully supported by evidence of the same "type and character previously held by the courts sufficient" (Fng. No. 4). The decree should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

AUGUST, 1951.

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FILED
AUG 30 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 289

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY, AND JOHN MORRELL & COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

HARRY E. BOE,
R. B. ELSTER,
J. E. GOGGIN,
FRANK W. SULLIVAN,
WARREN H. WAGNER,
ELDON MARTIN,
Attorneys for Appellants.

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Appellees.

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Come now appellants herein, including the intervener-appellant, and respectfully submit this their brief in opposition to the motion to affirm heretofore filed by appellees, and served upon appellants on August 13, 1951:

I.

Appellees imply that because the Commission came to certain conclusions in other cases involving terminal services at other industries, your function in this case is merely perfunctory and that you should approve what it did in this case forthwith.

However, this case is essentially different than the other cases. Issues and considerations are raised in this case which were not present in the others. In addition, this proceeding embraces matters not coming within the "principles" laid down in the Commission's original report in *Practices of Carriers Affecting Operating Revenues or Expenses, Ex Parte 104, Part II—Terminal Services,* 209 I.C.C. 11. There is not involved herein the question of whether this Court's decisions in cases involving terminal services at other industries were right or wrong, or whether reversal of the District Court's decree in this case would necessitate overruling or modifying such previous decisions.

It should be borne in mind that the questions involved are questions of law and not questions determinable only by nice balances of testimony of record. These substantial questions appear on the face of the Commission's reports in this proceeding. While we believe that much uncontradicted testimony was ignored by the Commission, the fault does not stop there. The Commission's reports themselves reveal what we believe to be serious errors of law used by it for its determination of this proceeding. It is our purpose in this appeal to present these errors for the full consideration of this Court, so that they may be corrected and not left to rest as disrupting precedent not in accordance with well established law.

The purpose of the motion to affirm is, under Supreme Court Rule 7(4), to determine whether "it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." At the outset we would like to point out that the Court below, possibly through oversight, committed two serious errors which, unlike other errors to be mentioned subsequently and mentioned in our Statement as to Jurisdiction, are not projections as it were of errors committed by the Interstate Commerce Commission in this proceeding, but

are new and distinct errors attributable to the District Court. These errors, we feel, are so manifest that they alone would warrant the denial of the motion to affirm. It is significant that these two errors are not referred to or explained in the motion to affirm.

In the first place, the District Court states, on page 6 of its opinion, that, "Their [plaintiffs' and intervener's] argument overlooks, we think, the fact that the Commission's findings with respect to plant disability and interference rest not alone on the fact that the Morrell plant is served by more than one carrier but are based also on the diversity of ownership of the tracks within the plant area, which makes it impossible for any one carrier to serve all the plant loading and unloading points without using or crossing tracks of the other carriers . . ." This conclusion of the Court is clearly inaccurate since the decision of the Division at 263 I.C.C. 73 specifically states that "it was stipulated by respondents' representatives at the hearing that if the carriers should undertake to switch the plant individually or by a pooling arrangement, they would be permitted to use any or all of the tracks in the plant irrespective of ownership." In addition, Section 1(18) of the Interstate Commerce Act specifically permits contracts between carriers, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching or side tracks. It is not known how heavy a part this error played in the reaching of the District Court's decision, but it cannot be denied that the statement of the District Court just quoted is manifestly inaccurate, in law and fact, and should be corrected.

In the second place, another distinct error was committed by the District Court, which error will be productive of widespread harm beyond the confines of this case alone if not speedily remedied. The District Court, in speaking of the Twenty-eight Hour Law, 45 U.S.C. 71-74, on pages

8 and 9 of its decision (Conclusion of Law Number 10), states as follows:

> "Therefore this transportation [of livestock] at the Morrell plant ends at such interchange tracks, and delivery at those points removes the animals from the custody of carriers and places that custody in Morrell. Any detention of animals in cars beyond the 28-hour limit after that delivery is the responsibility of Morrell, not the carriers . . ."

That detention of the animals beyond twenty-eight hours under the Twenty-eight Hour Law is the responsibility of Morrell and not the carriers in this situation is clearly inaccurate in law, and this inaccuracy is manifested by a bare reading of the statute itself. The statute, as it read prior to 1906, would support the District Court's holding, but the statute was expressly changed to relieve the owner or shipper from responsibility for detention beyond the 28-hour period, and placed that burden upon the carriers. Senate Report No. 975, 59th Congress, 1st Session, p. 4, wherein the views of the Secretary of Agriculture are endorsed by the Senate Committee, explains as follows:

> "10. Section 3 of the present bill—a penalty section—is changed by exempting the owner or shipper of the livestock from the penalty for failure to unload for food, rest, and water . . . Inasmuch as the carrier is assured payment for food furnished, it is thought the primary liability for failure to unload should be laid upon the carrier."

The erroneous precedent established by the lower Court, that an owner or shipper takes over the responsibility for the detention of animals beyond the 28-hour period under the Twenty-eight Hour Law, may foment much litigation and confusion in the entire livestock transportation field. Apparently the lower Court relies upon this erroneous proposition for its decision, and if this decision is affirmed summarily by the Supreme Court it may cause serious ramifications.

On page 2 of the motion to affirm, *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, is quoted as summarizing the "general legal principles involved." In that quotation the Supreme Court speaks of delivery being made "without 'interruption' occasioned for the convenience of the industry." Important questions of law, as indicated in our Statement as to Jurisdiction, arise in this proceeding since, we contend, the Commission has completely distorted the concept of interruption occasioned "for the convenience of the industry" and has substituted erroneous criteria for the determination of carrier obligation under line-haul rates. For example, can the requirement as to delivery of livestock, as laid down by Congress under the Twenty-eight Hour Law, 45 U.S.C. 71-74, be ignored by the Commission in its "fact finding" function and can this requirement be "found" not to be required of the rail carriers but merely to be a matter of industry convenience? Can the common law requirement as to delivery of livestock, as announced in *Covington Stock Yards Co.* v. *Keith*, 139 U.S. 128, and consistently adhered to since the passage of the Interstate Commerce Act, be "found" to entail merely industry convenience? Can the requirement as to delivery of livestock under the Interstate Commerce Act, *Erie Railroad Company* v. *Shuart*, 250 U.S. 465, be found to be merely a matter of industry convenience? The law is well established that delivery of livestock means delivery to a point suitable for unloading and that a charge for such delivery in addition to the line-haul rate is unlawful. However, the Commission in this proceeding purports to overrule the mandate of Congress and reverse the common law. The Commission here holds that delivery of livestock to a point suitable for unloading is "special" and not required of rail carriers under line-haul rates. This holding we believe to be not only erroneous in law but beyond the Commission's statutory authority as given by Congress.

II.

Another question not heretofore passed upon by this Court is whether the circumstance that more than one carrier serves an industry reduces the quantum of service which the carriers are required to furnish under their line-haul rates. This question was not involved in the original proceeding in *Ex Parte 104, Part II.* The Commission in this case has entered an order purportedly based on the principles announced in the original proceeding but actually based on matters not included therein. In this respect this case has nothing in common with those previously decided. The question of whether the number of carriers serving an industry is a circumstance which determines the obligations of each carrier under the line-haul rates is substantial because there are very many plants served by more than one carrier.

The Commission concluded that the several carriers serving the Morrell plant could not perform spotting service at their convenience, because they would interfere with each other. It was concluded further that such interference was a "plant disability." Thus, the Commission departed from the principles announced in the original *Ex Parte 104* proceeding. In substance, the principle announced in that proceeding was that the line-haul rates include pickup and delivery of carload freight at the usual and customary points of loading and unloading within a plant area, if such service can be performed without interference from the *industry.* Nowhere in the original report is there anything to indicate that the Commission adopted the principle that the transportation obligation under the line-haul rate ends at a point where a carrier encounters interference from *another carrier.* It is significant to note, also, the statement by appellees on page 6 of the motion to affirm that "the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the *shipper.*"

It is true the Commission attempted to prop up its conclusion by a generalization concerning "insufficient facilities", but it did not point out in what manner the "facilities" at this plant are alleged to be "insufficient."

In the final analysis, the Commission is now attempting to state a principle that the possibility of carrier interference is a plant disability which precludes each carrier from performing service.

In attempting to set up such a principle the Commission is acting beyond its powers, because in applying this principle in purported furtherance of its powers under section 6(7) of the Interstate Commerce Act, the Commission would be nullifying the provisions of another section of the same Act [section 5(1)]. This is the so-called "pooling" provision of the Act. Under that section the Commission is directed to approve the pooling of carrier service to promote economy and efficiency of operation. If the Commission is permitted to say that there is no duty to perform service because of the fact that the several carriers might interfere with each other, then such carriers are precluded from taking advantage of the poolin section of the Act and the Commission has thereby nullified its effect.

The Commission holds that *if* the railroads performed the switching, they *might* interfere with each other, and therefore there is no duty on any one of them beyond the interchange track. This imaginary hypothesis, chosen by the Commission as a basis for its order (although a novel concept in *Ex Parte 104, Part II* proceedings), must be carried to its logical conclusion. Let us see what alternatives are available *if* the industry should stop switching, and how interference between the railroads could be avoided. Of course, the industry could close up; or go entirely to truck, because the Commission says there is no duty *if* there *might* be interference. But what methods are available to remove carrier interference *if* the industry stopped switching:

1. Route all traffic over one carrier. There could then be no interference "with each other."
2. Pool, but the Commission (improperly) says that may not be done. In effect it nullifies that provision of law.
3. Create a switching line similar to that at Sioux City which has Commission approval. (*Sioux City Term. Ry. Switching*, 241 I.C.C. 53)
4. Create a transfer over which the three carriers would operate similar to that at Minnesota Transfer where nine carriers reach the industries, which the Commission approved. (*Terminal Allowance at Minnesota Transfer*, 268 I.C.C. 5, 10.)
5. Create an "arrangement" similar to that approved in the *Spencer Kellogg* case, where the railroads allocated different periods of time during which each would switch. (*Spencer Kellogg & Sons, Decatur, Ill.*, 262 I.C.C. 205, 213.)

III.

Appellees state (p. 6) that "the carrier's duty does not go beyond the point where the carrier encounters interruption or interference caused by the shipper." No mention is made at this point of "carrier interference" causing any changes in the obligation. It is stated (pp. 6 & 7) that "Morrell can obtain free delivery to its pens by the simple expedient of providing adequate facilities for the placement operation." This statement prompts two comments. First, the record as a whole supports the conclusion that present facilities are more than adequate. This is the only reasonable conclusion that can be drawn from the evidence which shows that deliveries of livestock are being and have been made without interference. Secondly, if there must be read into the statement the assumption that the reference to "facilities" means that the several carriers must be assigned separate pens so as to obviate the possibility of their interfering with each other, then the statement does not square with the principle that only *shipper* interference diminishes a carrier's obligation under its line-haul rates.

Appellees state (p. 6) that, "It is clear that no added charge may be made for a simple placement of the cars at the designated point." Here the placement of livestock by the railroads is a simple placement at the unloading docks, and the Commission, the lower Court and appellees point to no instance that indicates otherwise.

Appellees do not cite, and we do not believe any case can be cited approving delivery of livestock short of an unloading dock. In contrast thereto it may be noted that the same livestock rate bases apply to and from Ottumwa as to and from Chicago, Sioux City, Omaha, St. Paul, etc., where the Commission held a switching charge *should be removed* under more adverse conditions, than here, as recited in the reports of the Commission. *Omaha Live Stock Exc.* v. *Chicago & N. W. Ry. Co.*, 178 I.C.C. 1; *St. Paul Livestock Exc.* v. *Chicago, M., St. P. & P. R. Co.*, 194 I.C.C. 53; and *Chicago Live Stock Exchange* v. *Atchison, T. & S. F. Ry. Co.*, 219 I.C.C. 531. At Ottumwa the Commission is adding a charge.

IV.

In the original report in *Ex Parte 104, Part II, Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, at page 44, the Commission stated:

> "... Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."

It is asserted in the motion to affirm at page 7, that this constitutes a finding as to Morrell that the line-haul rates had not been fixed to include the services involved in this proceeding and that such a finding has a rational

basis. We submit that this conclusion as to "many" cannot be rationalized into a finding with respect to Morrell on this important question. The evidence of record stands uncontradicted that no additional services were rendered after the fixation of the line-haul rates by the Commission. Moreover, the reports of the Commission demonstrate the fact that the services at the Morrell plant have been *diminished* since the rates were fixed. Also, the Commission itself has asserted consistently in other cases that the rate structure, of which the Morrell rates are a part, was designed to include such services. For example, see *Chicago Live Stock Exchange* v. *Atchison, T. & S. F. Ry. Co.*, 219 I.C.C. 531, 546; *Omaha Live Stock Exc.* v. *Chicago & N. W. Ry Co.*, 178 I.C.C. 1, 14. Thus, we submit, it is clear that the Commission could not have intended that the above conclusion as to "many" of the industries be a finding as to Morrell. The Commission does not and cannot point to evidence of record to support such a finding with respect to Morrell. We believe that a finding that the line-haul rates paid by Morrell were not fixed to include these services is an important and material one in proceedings such as this, under section 6(7) of the Interstate Commerce Act, to determine what services are contemplated by those line-haul rates. The Supreme Court has considered this question important. *United States* v. *American S. & T. Plate Co.*, 301 U.S. 402, 404; *United States* v. *Wabash R. Co.*, 321 U.S. 403, 406; *United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186, 196, 197. We believe that the failure of the Commission to make a finding as to Morrell on this material question is not in accordance with the Administrative Procedure Act, Section 8(b), 5 U.S.C. Sec. 1007 (b).

V.

Other substantial questions arise in this case because part of the service performed by the industry has to do with preparing the empty car for loading—which is actually the duty of the carriers. These preparatory services are performed before loading and before the line-haul rate becomes involved. For example, if the car is not clean, the Bureau of Animal Industry inspector may reject it, and no question of the line-haul rate is involved. Or, if the car is out of repair, it can be rejected and no line-haul rate comes into play. All shippers are entitled to a suitable car and it is clear that switching for the purpose of preparing a suitable car cannot be passed off by the Commission in this case as switching merely for industry convenience. The Commission approved switching for these services by the carriers in *Sioux City Terminal Railway Switching*, 241 I.C.C. 53. A similar holding was made in *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338. "Shippers generally" are legally entitled to, and receive, a suitable car. There is no "principle" in the report in *Ex Parte 104, Part II*, dealing with this. It is arbitrary to hold one way at this plant and just the contrary at another. It is contrary to law. Nor can switching for preparation of a car become a duty of one other than the rail carriers by reason of the level of private car mileage allowance, as held by the Commission in this proceeding. This is transportation and car service required of rail carriers by law, and mileage allowance questions are not in issue in proceedings seeking to determine carrier duty under line-haul rates. Sections 1(3), 1(4), 1(10) and 1(11) of Part I of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C. Pars. 1(3), 1(4), 1(10) and 1(11); *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338, 342. This important question was absent in the other Supreme Court cases arising out of the *Ex Parte 104, Part II* proceedings, and was not mentioned in the motion to affirm.

VI.

In the motion to affirm reference is made to appellants' contention that the Commission's order results in discrimination as between rail and motor carriers in violation of the National Transportation Policy (49 U.S.C., Notes preceding §§ 1, 301, 901 and 1001). And the statement is made that this contention has been advanced in previous cases but has not prevailed. No citations are given, and appellants are unaware of any cases where this Court has passed upon the issue raised herein. That issue is this: The Commission has undertaken to state that, with respect to rail carriers only, the line-haul rate includes delivery up to a point where interference is encountered from the industry. With respect to motor carriers, over which they have similar jurisdiction, the Commission says that it has had no occasion to make a similar pronouncement. The net effect of this position is that motor carriers are permitted to perform more service under their line-haul rates than are rail carriers under similar circumstances. The question then is, does the Commission have the right to say that *as a matter of law* rail carrier service must stop at a point of interference, and, by inaction, permit motor carriers to proceed beyond such point? As far as we can determine this question has never been decided by this Court.

VII.

Another important issue is whether the Commission could base its order, in whole or in part, on findings made with respect to operations and conditions no longer in existence. In its report of March 12, 1951, the Commission adopted the findings made in its prior reports and presumably based its order thereon, although the record clearly shows that many changes were made in the plant since the first report was issued. It cannot be determined how much of the Commission's conclusions are based on

the conditions described in the prior reports which are no longer in existence. Thus, there is raised the question of whether the conclusions in the report of March 12, 1951, are based on proper findings which relate to existing conditions or whether the decision should be set aside because based on conditions no longer in existence. *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 284 U.S. 248.

In addition to the issues above stated, there is the basic issue of whether the Commission's order contains adequate findings supported by substantial evidence. This is not an issue lightly to be set aside by the mere observation that the Commission had before it evidence of the same type and character as introduced in other *Ex Parte 104* cases. To do such is to clothe the Commission with arbitrary powers not conferred by the Interstate Commerce Act. The record must be examined in the light of this Court's decision in the recent case of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, and a determination must be made of whether the record as a whole supports the Commission's conclusions. Appellants' contention is that it does not. In line with the ruling in the *Universal Camera* case the Commission has no arbitrary power to ignore or disregard the evidence which will not support its order and rely on such scraps of evidence as it may find which could be construed as supporting it. The question is whether the Commission violated the rule in the *Universal Camera* case by picking out extreme, unusual or assumed situations and using them as the basis for an order while at the same time ignoring the great bulk of the evidence which shows that livestock is being delivered without interference and that dead freight could also be handled by the rail carriers with their own engines without interference attributable to the industry.

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been decided by this Court—appellants respectfully

pray that the motion to affirm be denied and that the case proceed to a determination on its merits.

Respectfully Submitted,

HARRY E. BOE,

R. B. ELSTER,

J. E. GOGGIN,

FRANK W. SULLIVAN,

WARREN H. WAGNER,

ELDON MARTIN,
Attorneys for Appellants.

No. 289. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *United States Smelting Co.*, 339 U. S. 186. MR. JUSTICE MINTON took no part in the consideration or decision of this case. *Harry E. Boe, Frank W. Sullivan, Warren H. Wagner* and *Eldon Martin* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 98 F. Supp. 119.